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In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1891

SEA-LAND SERVICE, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Claims (Pet. App. A) is reported at 493 F. 2d 1357.

The opinion and order of the Maritime Administrator (Pet. App. B) is reported in Pike & Fisher, 13 S.R.R. 447. The decision of the administrative law judge (Pet. App. C) is reported in Pike & Fisher, 12 S.R.R. 197. The decision of the Contracting Officer of the Maritime Administration of the Department of Commerce (Pet. App. D) is unreported.

JURISDICTION

The judgment of the Court of Claims was entered on March 20, 1974. The petition for a writ of certiorari was filed on June 18, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

QUESTIONS PRESENTED

1. Whether the Court of Claims afforded petitioner the review of its contract claim to which it was entitled under the Wunderlich Act, 41 U.S.C. 321-322.

2. Whether the Court of Claims correctly construed and applied the Vessel Exchange Act (Pub. L. 86-575, 74 Stat. 312) in affirming the final administrative decision denying petitioner's contract claim.

STATUTES INVOLVED

The Wunderlich Act, 41 U.S.C. 321-322, and the Vessel Exchange Act, Pub. L. 86-575, 74 Stat. 312,[1]

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[1] Petitioner incorrectly cites (Pet. 3) and reproduces (Pet. App. F) 46 U.S.C. 1160(i) as the applicable Vessel Exchange Act. The Vessel Exchange Act in effect at the signing of the Ship Exchange Contract involved in this case is Pub. L. 86-575, 74 Stat. 312, approved July 5, 1960. This Act was amended and extended for five years on October 10, 1965 by Pub. L. 89-254, 79 Stat. 980. The Act was again amended and extended for an additional two years (to July 5, 1972) on October 21, 1970 by Pub. L. 91-469, 84 Stat. 1018, 1022-1023. The particular language of the Act on which this case turns, however, has not been changed materially from the original.

are reproduced in a Statutory Appendix to this brief, *infra*, pp. 14-18.

STATEMENT

On May 13, 1965, petitioner Sea-Land entered into a Ship Exchange Contract with the United States pursuant to the Vessel Exchange Act, 74 Stat. 312, for the exchange of three of its cargo vessels—the CHATHAM, COLORADO, and FANWOOD (the "exchange" or "traded-in" vessels)—for three Government-owned vessels of the same type—the ARIZPA, WACOSTA and WARRIOR (the "transfer" or "traded-out" vessels). Because the transfer vessels were to be converted into containerships and were therefore not immediately available for commercial operation, a Use Agreement Contract was entered into on the same date under which the Maritime Administration (MARAD) permitted Sea-Land to retain and operate the exchange vessels until the conversion of the transfer vessels was completed.[2]

As of the date of exchange, the vessels were assigned the following "unadjusted fair and reasonable values", based on the findings of MARAD's Ship Valuation Committee:

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[2] Thus, the vessels' service was not interrupted at that time for drydocking and condition surveying.

EXCHANGE VESSELS

CHATHAM	$ 468,000
COLORADO	453,750
FANWOOD	458,500
TOTAL	$1,380,250

TRANSFER VESSELS

ARIZPA	$ 444,250
WACOSTA	444,250
WARRIOR	453,750
TOTAL	$1,342,250

These values were agreed to by both parties and were embodied in Article 4 of the Exchange Contract.

In the Exchange Contract, the parties agreed that Sea-Land would accept title to the transfer ships on an "as is, where is" basis, and that the "unadjusted" fair and reasonable values of the transfer ships would be their fair and reasonable values—*i.e.*, that the values assigned to the transfer ships by MARAD's Ship Valuation Committee would be their final values for purposes of the vessel exchange. However, concerning the exchange ships the parties agreed that an adjustment would be made to the values assigned by the Ship Valuation Committee. Under the contract, the unadjusted values of the exchange vessels were to be reduced by the cost of repairs found to be necessary to bring those ships up to standards for their class after they were physically delivered to MARAD at the end of the use period.[3]

[3] Article 3 of the Exchange Contract provides, in pertinent part:

[Footnote continued on page 5]

The parties agreed that Sea-Land would pay to MARAD the amount by which the values of the transfer ships traded out to Sea-Land exceeded the values of the exchange ships traded in, as determined

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[3] [Continued]

(b) The "fair and reasonable value" of an Exchange Ship means:

(1) The unadjusted fair and reasonable value of the Exchange Ship as stated and agreed upon in Article 4(a) hereof

* * * * *

minus

(3) The cost of in-class work necessary on the Exchange Ship, but not performed prior to delivery, as finally estimated by the Contracting Officer, based upon a physical survey of the Ship, taking into account the provisions of Article 7 of this Contract.

* * * * *

The terms "in-class" and "in-class work" are defined in Article 3 of the Exchange Contract as follows:

(c) The term "in-class", as applied in this Contract to an Exchange Ship, means the condition of the Ship is such as to entitle it to: (1) the highest classification of the American Bureau of Shipping for the specific type ship, and (2) valid Certificates of Inspection for compliance with the regulations of the United States Coast Guard, the United States Public Health Service, and the Federal Communications Commission.

(d) The term "in-class work," as applied in this Contract to an Exchange Ship means drydocking, surveying as required by the regulatory bodies, towage, and other work or services incidental to the survey, and all class requirements found during the course of the survey, as determined by the Contracting Officer based upon the delivery survey, taking into account the provisions of Article 7 of this Contract, but does not include the cost of the Shipowner's surveyors or agents, or any other overhead expense.

by the contracting officer after delivery and survey of the exchange ships. Pending the determination of the class work found to be necessary during the course of the survey, Article 4(a) of the Exchange Contract provided for an "estimated" cost of necessary repairs of $40,000 per ship to be deducted from the unadjusted value of each exchange vessel, as required by MARAD regulations (46 C.F.R. (1965 ed.) 375.3(k)(3)). When the Exchange Contract was executed on the date of exchange Sea-Land paid to MARAD $82,000, representing the estimated amount by which the values of the transfer vessels exceeded the values of the exchange vessels.

The exchange ships, the CHATHAM, COLORADO and FANWOOD, were drydocked, physically surveyed and redelivered to MARAD at the completion of the use (charter) period on April 7, April 22, and August 18, 1966, respectively. Based upon the survey reports, which were signed by representatives of both parties, the contracting officer determined the cost of in-class work required on the exchange vessels was $356,000, $255,000 and $250,000, respectively, for the CHATHAM, COLORADO and FANWOOD. These amounts were deducted from the unadjusted values, after making certain other minor and undisputed adjustments to those values, to ascertain the fair and reasonable values of the exchange ships. This resulted in final adjusted fair and reasonable values as follows:

CHATHAM	$110,116.76
COLORADO	208,513.61
FANWOOD	206,715.33

The contracting officer concluded that Sea-Land owed the United States $816,904.30 less $82,000 paid by Sea-Land when it signed the Exchange Contract, representing the amount by which the total value of the traded-out ships exceeded the total value of the traded-in ships.

Sea-Land subsequently paid, under protest, the balance of $734,904.30, and appealed the contracting officer's final decision (Pet. App. D) within the Maritime Administration, as provided by Article 16 of the Exchange Contract. An initial decision by the MARAD Chief Hearing Examiner,[4] to whom Sea-Land's appeal had been referred for an evidentiary hearing, recommended that Sea-Land be reimbursed in the full amount of $816,904.30 in order to perfect the vessel exchange (Pet. App. C). Thereafter, the Maritime Administrator issued his final opinion and order affirming the decision of the contracting officer, rejecting the initial decision and recommendation of the Chief Hearing Examiner, and dismissing Sea-Land's appeal with prejudice (Pet. App. B).

Sea-Land then sought review of MARAD's final opinion and order in the Court of Claims under the Wunderlich Act, 41 U.S.C. 321-322. The Court of Claims found that the decision of the Administrator was supported by substantial evidence, was not arbitrary or capricious and was not based upon any errors of law (Pet. App. 23a). Accordingly, petitioner's claim was denied (*ibid.*).

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[4] Now denominated "Chief Administrative Law Judge."

ARGUMENT

Petitioner was accorded full review of its contract claim by the Court of Claims under the Wunderlich Act, and that court's decision is correct. Moreover, no other questions of prospective public importance are involved since the Vessel Exchange Act, construction of which is at issue, is no longer in effect. Review by this Court is therefore not warranted.

1. Under the Wunderlich Act, a final administrative decision on a question of fact concerning a government contract "shall be final and conclusive unless the same is fraudulent or capricious or arbitrary or so grossly erroneous as necessarily to imply bad faith, or is not supported by substantial evidence." 41 U.S.C. 321; *United States* v. *Carlo Bianchi & Co.*, 373 U.S. 709, 714; *Crown Coat Front Co.* v. *United States*, 386 U.S. 503, 513. An administrative decision on a question of law, however, is not entitled to finality or to a presumption of correctness and is not binding on the court. 41 U.S.C. 322; *Northwestern Industrial Piping, Inc.* v. *United States*, 467 F. 2d 1308, 1311 (Ct. Cl.).

This standard of review was expressly adhered to by the Court of Claims (Pet. App. 5a-6a), which found after thorough analysis that (Pet. App. 23a):

> The decision of the Maritime Administration is supported by substantial evidence, is not arbitrary or capricious, and is not based upon errors of law. It is therefore, by Wunderlich Act standards, binding here. * * *

Petitioner's contention that the court "retreated" from established principles of review (Pet. 6) is therefore without substance.[5]

2. Petitioner contends that the Court of Claims erred in upholding MARAD's decision that, under the Vessel Exchange Act, the "fair and reasonable value" of the exchange vessels was to be determined through reference to the "cost of placing the vessels in class with respect to hull and machinery * * *."[6] First, petitioner argues that this statutory requirement was inapplicable because the vessels already possessed the highest American Bureau of Shipping (ABS) classification at the time they were redelivered to MARAD (Pet. 7). And second, petitioner argues that all adjustments to the exchange vessels' May 13, 1965 valuation were precluded because the Act required that such vessels be valued at the time of the exchange and not, as the court ruled, at the time those vessels were redelivered to MARAD (Pet. 7-8).

The Vessel Exchange Act provided that, in determining the fair and reasonable value of the traded-in and traded-out vessels, "the Secretary shall consider the cost of placing the vessels in class with

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[5] Petitioner also contends that the court's "error began with the arbitrary rejection of the Chief Administrative Law Judge's decision" (Pet. 6). But, under the Wunderlich Act, 41 U.S.C. 321, it is only the "decision of the head of [a] department or agency or his duly authorized representative or board" that is subject to Court of Claims review. *United States* v. *Carlo Bianchi & Co., supra.*

[6] Section 510(i)(3), 74 Stat. 312.

respect to hull and machinery * * *."[7] The Court of Claims held that this provision required the Secretary to take into account the physical condition of the vessels in determining their value, and in order to do that it was necessary to ascertain

> the cost of all class requirement work necessary, as determined at the time of the exchange, to put the vessels in a condition which would *then* entitle them to the highest ABS classification and valid certificates from the Coast Guard, PHS and FCC. Such an interpretation is consistent with the stated purpose of considering the cost of in-class repairs—the determination of a ship's value—because it takes account of the actual condition of the vessel, the only true measure of its value. The standard against which the actual condition of a vessel is measured for the purpose of determining its value is the condition which would entitle it to the highest ABS classification and valid certificates from the Coast Guard, PHS and FCC. [Footnote omitted.][8]

The court pointed out that no measure of condition or value can be derived merely from the fact that a vessel possessed ABS classification or valid certificates at the time of the exchange. This is because "ABS classification surveys are conducted only once in four or five years" and a "vessel's condition with respect to in-class requirements—and hence its value—might be quite different in its fifth year of operation after ABS survey and classification than what it was in

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[7] *Ibid.*

[8] Pet. App. 11a; emphasis in original.

its first year of operation after survey and classification." Pet. App. 11a. All three vessels involved in this case, the court noted, were in their fifth year of operation after survey and classification.[9]

With respect to the time of valuation of the exchange vessels, the Court of Claims observed that "[t]he relevant point in time under this exchange contract for determination of class work necessary on the exchange ships was the date of redelivery rather than the date of exchange." [10] The court ruled that this was permissible in this instance because:

> In the first place, the statutory prescribed requirement was complied with because the exchange vessels *were* valued as of the date of the exchange. It is true, the valuation determina-

[9] The Court of Claims earlier construed a similar provision of the Merchant Ship Sales Act of 1946, 60 Stat. 41, as amended, 62 Stat. 1199, 46 U.S.C. 864a, in the same manner. Section 3(d)(1) of that Act required the Maritime Commission to deduct from the sales price of a war built vessel sold under the Act "the amount estimated by the Commission as the cost of putting the vessel in class." In *Southeastern Oil Delaware, Inc.* v. *United States*, 124 Ct. Cl. 561, the court made clear that the cost of class repairs found to be necessary at the time of sale was required to be deducted from the sales price even though "some vessels at the time of the sale had American Bureau of Shipping and Coast Guard certificates which were not then due for renewal" (Finding of Fact 25, 124 Ct. Cl. at 597). The court stated that "[t]o be operable they had to be, according to the trade expression, 'in class', that is, in condition to pass the inspection of the regulatory agencies of the Government whose certification of approval was necessary for lawful operation" (124 Ct. Cl. at 565).

[10] Pet. App. 11a, n. 14.

> tion was fixed on an "unadjusted" basis as of that time, but the determination of the final values was deferred, as found by the [Administrator], "largely at Sea-Land's behest so as to afford it continued use of the traded-in vessels." The true condition of the exchange vessels—and therefore their final values—could not be determined until they were free of cargo, drydocked and surveyed. Since the exchange vessels were at sea when plaintiff applied to MARAD to trade them in, and since the traded-out ships were not then available for Sea-Land's use, Sea-Land requested postponement of drydocking and surveying, thereby delaying a finalized determination of the ships' values.[11]

The court rejected petitioner's view that the Act precluded any and all adjustments to a ship's value subsequent to the date of the exchange valuation on the ground that

> such an unqualified literal application of the statutory provision would defeat the general purpose and policy of the Vessel Exchange Act.
> * * *
>
> The [Administrator] concluded that if a final and conclusive trade-in allowance must be established as of the date of an exchange contract, no contracts could be executed until after the traded-in vessels were drydocked and surveyed and deductions for the cost of placing the vessels in class were made. Such a procedure would vitiate the benefits to those shipowners wishing to upgrade their fleets but unable or un-

[11] Pet. App. 15a; emphasis in original.

willing to interrupt their commercial service at the date of the exchange. This consequence of plaintiff's interpretation of the statutory language in its literal sense would clearly be inconsistent with the purpose and policy of the Vessel Exchange Act.[12]

3. As noted above (n. 1, *supra*), the Vessel Exchange Act expired as of July 5, 1972. Thus, the questions of statutory construction posed by petitioner have no prospective significance. See *District of Columbia* v. *Sweeney*, 310 U.S. 631.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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SEPTEMBER 1974.

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[12] Pet. App. 15a-16a.

STATUTORY APPENDIX

The Wunderlich Act, 41 U.S.C. 321-322, provides:

§ 321. Limitation on pleading contract-provisions relating to finality; standards of review

No provision of any contract entered into by the United States, relating to the finality or conclusiveness of any decision of the head of any department or agency or his duly authorized representative or board in a dispute involving a question arising under such contract, shall be pleaded in any suit now filed or to be filed as limiting judicial review of any such decision to cases where fraud by such official or his said representative or board is alleged: *Provided, however,* That any such decision shall be final and conclusive unless the same is fraudulent or capricious or arbitrary or so grossly erroneous as necessarily to imply bad faith, or is not supported by substantial evidence.

§ 322. Contract-provisions making decisions final on questions of law

No Government contract shall contain a provision making final on a question of law the decision of any administrative official, representative, or board.

Vessel Exchange Act, Public Law 86-575, 74 Stat. 312, approved July 5, 1960

AN ACT

To authorize the exchange of certain war-built vessels for more modern and efficient war-built vessels owned by the United States.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 510 of the Merchant Marine Act, 1936, is amended by adding a new subsection as follows:

"(i) In order to improve the type and suitability of vessels operating in the domestic and foreign commerce of the United States, and to further the policies of this Act, the Secretary of Commerce is authorized (subject to the provisions of this subsection) to acquire at any time within five years from the date of enactment of this Act war-built vessels (which are defined for purposes of this subsection as oceangoing vessels of one thousand five hundred gross tons or over which were constructed or contracted for by the United States shipyards during the period beginning September 3, 1939, and ending September 2, 1945) in exchange for more modern or efficient war-built vessels owned by the United States. Such exchanges shall be subject to the following conditions:

"(1) The traded-in vessels shall have been owned and operated without subsidy under title VI of this Act by a citizen or citizens of the United States, and documented under the laws of the United States, for at least three years immediately prior to the date of the exchange.

"(2) The fair and reasonable value of the traded-in and traded-out vessels shall be determined, as of the date of the exchange, pursuant to subsection (d) of this section.

"(3) In determining said fair and reasonable value the Secretary shall consider the cost of placing the vessels in class with respect to hull and machinery, and, with respect to any traded-out vessels of the military type, the cost of reconverting and restoring such vessels for normal operation in commercial service. The Secretary of Commerce shall consult with and obtain the approval of the Defense Department before any vessel of a military type is traded out under the provisions of this subsection. In determining the value of the traded-in vessel or vessels the Secretary may take into consideration the cost to the owner of compliance with subparagraph (8), clauses (A) and (B), of this subsection.

"(4) The value of the traded-out vessel which is in excess of the value of the traded-in vessel or vessels shall be paid in cash at the time of the exchange. No payments shall be made by the United States to the owner of a traded-in vessel in connection with any exchange under this subsection.

"(5) A contract shall be entered into under this subsection by any person acquiring a traded-out vessel, which shall provide (A) that in the event the United States shall, through purchase or requisition or otherwise, reacquire ownership of said vessel, at any time within twenty years of the date of construction thereof, the owner shall be paid therefor the value thereof, but in no event shall such payment exceed the fair and reasonable exchange value determined under this subsection (together with the actual cost of capital improvements thereon) depreci-

ated to the date of such purchase or acquisition, or the fair and reasonable scrap value of such vessel, as determined by the Secretary of Commerce, whichever is the greater; (B) that such determination shall be final; (C) that in computing the depreciated exchange value of such vessel, the depreciation shall be computed on the vessel on the schedule adopted or accepted by the Secretary of the Treasury for Federal income tax purposes as applicable to such vessel; (D) that such vessel shall remain documented under the laws of the United States for a period of at least five years after the date of the exchange, or twenty years from the date of its construction, whichever is the later date; and (E) that the foregoing conditions respecting requisition or acquisition of ownership by the United States and documentation shall run with the title to such vessel and be binding on all owners thereof. Any other conditions respecting purchase or requisition by the United States heretofore applicable by statute to any traded-out vessel are hereby made inapplicable to such vessel.

"(6) Neither subsection (e) of this section, nor the nontaxable exchange provisions of the Internal Revenue Code, shall apply to the exchange of vessels under this subsection.

"(7) Any repairs or reconversion necessary at the time of the exchange to place the traded-out vessel in class and prepare it for commercial operation shall be performed in a shipyard within the continental United States.

"(8) The owner of the traded-in vessel, at his own expense and in a manner satisfactory to the Secretary of Commerce, shall (A) effect deactivation and preparation of the traded-in vessel and its equipment for storage or layup; (B) make delivery of such ves-

sel and its equipment at a location designated by the Secretary of Commerce; and (C) execute a bond, with one or more approved sureties, conditioned upon indemnifying the United States from all loss resulting from any lien against such vessel existing at the time of the exchange.

"(9) No tanker vessel shall be traded out under the provisions of this subsection."

Approved July 5, 1960.

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